Hastings Law Journal

Volume 37 | Issue 4 Article 4

1-1986

States as Litgants in Federal Court: Whether the Seventh Amendment Right to Jury Trial Applies to the States

Julia A. Dahlberg

NOTES

States as Litigants in Federal Court: Whether the Seventh Amendment Right to Jury Trial Applies to the States

The seventh amendment to the United States Constitution guarantees civil litigants the right to jury trial in federal court: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[1] Although courts have struggled to define the scope and meaning of this federal right over the past two centuries,[2] the Supreme Court has yet to determine whether the seventh amendment right to jury trial extends to a state participating as a litigant in an action brought in federal court.

The right to civil jury trial was established primarily to ensure impartial resolution of facts and to protect against arbitrary government action.[3] Jury trial was "intended to secure the individual from the arbitrary exercise of the powers of government . . . ."[4] Given these underlying purposes, the propriety of extending the seventh amendment right to state litigants appears to depend upon whether the "individual" that the jury trial was established to protect includes the state government. If the seventh amendment protects against the arbitrary exercise of power by state as well as federal governments, then granting a state government the right to demand a jury trial would allow a state to exercise a right established as a protection against itself. Such a result seems inconsistent with the purpose of the seventh amendment. Yet, because trial by jury occupies such a firm place in our history and jurisprudence, "every en-

1. U.S. CONST. amend. VII. The seventh amendment applies to civil actions in federal court regardless of the basis of subject matter jurisdiction. Thus, because federal subject matter jurisdiction is predicated on the existence of a federal question, 28 U.S.C. § 1331 (1982), or diversity of citizenship, *id.* § 1332, the seventh amendment applies to cases adjudicating federal or state law. Federal law, however, governs the determination of jury trial rights in federal court. Simler v. Conner, 372 U.S. 221, 222 (1963) (per curiam).

Most states have constitutional jury trial provisions similar to the seventh amendment. *See* Kane, *Civil Jury Trial: The Case for a Reasoned Iconoclasm*, 28 HASTINGS L.J. 1, 3 n.8 (1976); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 640 n.2 (1973). This Note does not discuss a state's right to civil jury trial in state court.

2. *See* Kane, *supra* note 1, at 1-2; Wolfram, *supra* note 1, at 639.

3. *See infra* text accompanying notes 157-67.

4. Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819).

croachment upon it has been watched with great jealousy."[5]

Only the Ninth and Tenth Circuits have confronted the issue of whether the seventh amendment right to jury trial extends to state litigants in federal court,[6] each concluding that the state does have such a right.[7] Both courts purported to apply the traditional method used to define the scope of the seventh amendment,[8] the historic issue test, which provides for a right to jury trial for issues that are legal in nature and of the sort that would have been tried by a jury in 1791, the year the seventh amendment was adopted.[9]

In *Standard Oil Co. v. Arizona*,[10] the Ninth Circuit purported to apply the historic issue test, but took an unprecedented leap by analyzing whether the *parties* historically had a right to jury trial rather than whether the *issues* historically were tried by juries.[11] This novel extension of the traditional test was legally unsupported, and the historical findings upon which the court relied were inaccurate. Because of these deficiencies, another court easily could apply the Ninth Circuit's reasoning to reach the contrary conclusion that the seventh amendment guarantee does not extend to states.

The Tenth Circuit, on the other hand, did apply the traditional formulation of the historic issue test in *United States v. New Mexico*.[12] In holding that the scope of the seventh amendment extended to the states,[13] however, the court's conclusion rested solely on its determination that the issue involved was legal. The court failed to consider the significance of the fact that a *state* was demanding a jury trial,[14] and whether that fact should have any effect on the application of the historic issue test. Because the *New Mexico* decision failed to address the specific question of whether a state litigant has a jury trial right under the seventh amendment, it cannot be considered dispositive of that issue.

5. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830) (Story, J.); *see* Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

6. The United States Supreme Court has not addressed this issue.

7. Standard Oil Co. v. Arizona, 738 F.2d 1021 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 815 (1985); United States v. New Mexico, 642 F.2d 397 (10th Cir. 1981).

8. *See infra* text accompanying notes 39-44.

9. *See infra* text accompanying notes 39-44.

10. 738 F.2d 1021 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 815 (1985).

11. *See infra* notes 24-30, 58-65 & accompanying text. The Ninth Circuit also concluded that the federal antitrust laws did not provide the right to jury trial. *Standard Oil*, 738 F.2d at 1025 (citing *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1076-77 (3d Cir. 1980)). When a federal statute is silent on the jury trial issue, the Supreme Court usually assesses the right to jury trial under the seventh amendment. Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 CALIF. L. REV. 1, 18 (1981); *see infra* notes 51-52 & accompanying text.

12. 642 F.2d 397 (10th Cir. 1981).

13. *Id.* at 400-02; *see infra* text accompanying notes 111-22.

14. *New Mexico*, 642 F.2d at 400-02.

Therefore, like *Standard Oil*, the Tenth Circuit's opinion provides little guidance to courts faced with this issue.

Another conceivable method for determining a state's seventh amendment rights is to apply the approach taken in cases assessing the constitutionality of the nonjury trial provision of the Foreign Sovereign Immunities Act ("FSIA").[15] These cases[16] utilize a broad application of the historic issue test, focusing on whether the action embodying the legal issues would have been tried by English juries in 1791.[17] Because England did not have "states" similar to the United States, this broad application of the test would seem to deny any litigant the right to jury trial in cases in which the state is also a litigant. This result is illogical and contrary to the established principles of the seventh amendment. Consequently, the broad test of the FSIA cases cannot serve as an appropriate standard for determining the extent of the states' rights under the seventh amendment.

In light of the fact that the present lack of a sound basis for extension of the seventh amendment protection to states leaves open the possibility of inconsistent determinations regarding that issue, this Note fully examines this issue and develops a sound basis for extension of the seventh amendment protection to states. The Note first discusses the traditional historic issue test. It then demonstrates that the Ninth Circuit's application of the historic issue test in *Standard Oil* provides weak precedent for extension of the seventh amendment right to the states. Next, the Note demonstrates that the traditional historic issue test as currently formulated and applied by the Tenth Circuit in *New Mexico* is inadequate to determine whether a state should be able to invoke the protections of the seventh amendment. The Note then applies the FSIA cases' broad interpretation of the historic issue test to the issue of a state's seventh amendment rights and concludes that the result is illogical and contrary to established law.

Finally, because application of the historic issue test fails to provide adequate precedent for resolution of the issue, the Note argues that policy considerations underlying the seventh amendment should serve as guidelines for determining a state's jury trial rights. The Note concludes that extending the seventh amendment guarantee to the state is consistent with these policy considerations, whether the federal court action is based upon state or federal law. These guidelines should supplement the historic issue test, which should be retained to determine the threshold question of whether the underlying issue carries a right of jury trial. Determination of a state's seventh amendment jury trial right based upon these policy considerations provides a sound basis upon which future

15. 28 U.S.C. § 1330 (1982).

16. *See infra* note 128.

17. *See infra* text accompanying notes 129-38.

courts may rest their conclusion that the seventh amendment guarantee extends to the states.

Traditional Historic Issue Test

The seventh amendment "preserves" the right to jury trial in "suits at common law."[18] The amendment, however, does not specify when and why a litigant has a right to demand a jury trial. Over the past two centuries, the courts have struggled to delineate the scope of the seventh amendment guarantee.

The Historical Approach

Because the seventh amendment merely "preserves" the right to jury trial, the Supreme Court has consistently held that, to define the scope of the right, courts must refer to the common law of England[19] as it existed in 1791,[20] the year the seventh amendment was adopted. Initially, the Supreme Court determined whether a litigant had a right to jury trial in federal court by using the "historical approach."[21] Under

18. U.S. CONST. amend. VII.

19. Slocum v. New York Life Ins. Co., 228 U.S. 364, 379-80 (1913); United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750). In *Wonson*, Justice Story stated:

> Beyond all question, the common law here alluded to [in the seventh amendment] is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.

Id. at 750.

While Justice Story might have thought that reference to English practice was "obvious," Professor Wolfram notes that "[n]o federal case decided after *Wonson* seems to have challenged this sweeping proclamation; perhaps later judges have hesitated to appear to be the kind of intractable person that would require Mr. Justice Story to elaborate on the obvious." Wolfram, *supra* note 1, at 641.

Reference to the common law of England in 1791 appears to be a compromise because the individual jury practices of all the different colonies were so diverse. *Id.* at 654. *See generally* Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966).

20. Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935) ("The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted."); Dimick v. Schiedt, 293 U.S. 474, 476 (1935) ("In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.").

Under present English law, civil jury trial is available as a matter of right only in cases of fraud, defamation, malicious prosecution, or false imprisonment. 16 HALSBURY'S LAWS OF ENGLAND ¶ 618 (Lord Hailsham 4th ed. 1976) [hereinafter cited as HALSBURY]; *see also* 37 HALSBURY, *supra*, ¶ 474.

21. *See, e.g.*, Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476 (1935); United States v. Wonson, 28 F. Cas. 745, 749-50 (C.C.D. Mass. 1812) (No. 16,750).

this approach, a court determined whether the case in question would have been tried at law or in equity in England in 1791.[22] The right to jury trial was decided on a "whole case" basis: if an action was predominately equitable in nature, the parties had no right to a jury trial; if the action was generally cognizable at common law, and thus legal in nature, jury trial was permitted.[23]

When analyzing statutory causes of action created since 1791, the Supreme Court has reasoned by analogy to the common law of England.[24] "[T]he right of action should be analogized to its historical counterpart, at law or in equity, for the purpose of determining whether there is a right of jury trial," unless Congress has expressly prescribed the mode of trial.[25] If the issues in the new statutory cause of action are analogous to issues that would have been tried by English juries in 1791, the seventh amendment applies to the modern action.[26] Thus, there is no constitutional right to jury trial of issues that did not exist in England in 1791 or that have no close historical analogues.

Courts have determined what constitutes a "historical analogue" on a case by case basis. Rather than articulating standards, courts have made rough judgments concerning the similarity of historical statutes or causes of action to their purported counterparts in modern litigation.[27] Courts have focused on the issue in the modern action, not on the action as a whole or the nature of the parties, and determined whether it is analogous to a "legal issue" tried by juries in eighteenth-century England.[28] For example, the Supreme Court found in *Pernell v. Southall*

22. Kane, *supra* note 1, at 2.

23. Jorde, *supra* note 11, at 12.

24. For example, a right to jury trial was found in Lorillard v. Pons, 434 U.S. 575 (1978) (suit for lost wages under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982)); Pernell v. Southall Realty, 416 U.S. 363 (1974) (summary action for repossession of real property); Curtis v. Loether, 415 U.S. 189 (1974) (action for damages and injunctive relief for violation of fair housing provisions of the Civil Rights Act of 1968, 42 U.S.C. § 3612 (1982)); Fleitmann v. Welsbach St. Lighting Co., 240 U.S. 27 (1916) (private antitrust actions).

25. Note, Ross v. Bernhard: *The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112, 113 (1971) (citations omitted).

26. *See supra* text accompanying note 25; *see also* Jorde, *supra* note 11, at 11; Kane, *supra* note 1, at 11-15.

27. *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189, 195 n.10 (1974); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830); *see also* Jorde, *supra* note 11, at 11 n.40, 54.

28. According to the court in Martin v. Detroit Marine Terminals, Inc., 189 F. Supp. 579 (E.D. Mich. 1960), "the test is *not* whether such action is more or less broadly analogous to an established common-law action, but rather whether such issue must, by analogy or because of historical considerations, be characterized as a 'legal' issue." *Id.* at 582 (emphasis in original); *accord* Ochoa v. American Oil Co., 338 F. Supp. 914, 918 (S.D. Tex. 1972); *see also supra* text accompanying note 25.

Professor Jorde has suggested that it might be more logical to search for issue analogues by first locating those English statutes and common-law causes of action existing in 1791 that share an identity of purpose, parties, procedures, and relief with the modern litigation in ques-

Realty[29] that the closest historical analogue to the statutory cause of action for recovery of real property was an ejectment action. Because ejectment actions were tried before English juries in 1791, the Court held that the right to jury trial existed in the modern action.[30]

The Historic Issue Test

In *Ross v. Bernhard*,[31] the Supreme Court considerably refined the historical approach. The Court held that "[t]he Seventh Amendment question depends upon the nature of the issue to be tried rather than the character of the overall action."[32] The issue in *Ross* was whether there was a seventh amendment right to jury trial in a shareholders' derivative action in federal court. A shareholders' derivative action usually involves both legal and equitable issues: the shareholders' standing to sue on behalf of the corporation involves an equitable issue, while the underlying corporate claim often involves a legal issue.[33] Traditionally, both issues had been tried to the chancery court.[34] The Supreme Court focused separately on each issue to determine whether a jury trial right existed. The Court held that the shareholders' right to sue, an equitable issue, must be tried to the judge as finder of fact, and the corporate claim for damages, a legal issue, may be tried to a jury.[35]

In a footnote, the *Ross* Court expressed the following approach for the determination of whether an issue is legal:

> As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.[36]

---

tion. "If such statutes or causes of action exist, then litigation involving them should next be scrutinized to determine whether each of the issues present in the modern litigation has an analogue, and if so, whether the analogue was tried to a judge or a jury." Jorde, *supra* note 11, at 54.

29. 416 U.S. 363 (1974).

30. *Id.* at 375-76.

31. 396 U.S. 531 (1970).

32. *Id.* at 538.

33. *Id.* at 534-35; *see* Kane, *supra* note 1, at 10.

34. *Ross*, 396 U.S. at 534; *see* Kane, *supra* note 1, at 10.

35. *Ross*, 396 U.S. at 539. The Court stated that since the merger of law and equity, "there is no longer any procedural obstacle to the assertion of legal rights before juries, however the party may have acquired standing to assert those rights." *Id.* at 542.

36. *Id.* at 538 n.10. England in 1791 maintained separate court systems for suits in equity and actions at law. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 446 (6th ed. 1938). With the Judiciary Act of 1789, ch. 20, 1 Stat. 73 (codified as amended at 28 U.S.C. (1982)), Congress created a single federal judicial system in which the trial courts maintained separate equity and law dockets. *See* 5 J. MOORE, J. LUCAS & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 38.08[5-1] (2d ed. 1985) [hereinafter cited as J. MOORE]. All issues in equity were

Because the seventh amendment mentions only that history should be considered in the sense of "preserving" the use of the jury in 1791,[37] the Court's reference to the "practical abilities and limitations of juries" indicates an injection of policy considerations into the determination of the scope of the seventh amendment.[38]

The *Ross* Court's refinement of the historical approach therefore involves a two-stage, historic issue test.[39] The first stage of the historical analysis is to determine whether an issue is legal or equitable in nature.[40] The three-step method set forth in the *Ross* footnote[41] provides guidance for this initial determination. New statutory causes of action are deemed legal or equitable in nature depending upon whether an analogous issue would have been tried by a jury or a judge in England in 1791.[42] If the issue is deemed equitable in nature, there is no right to jury trial. If the issue is legal in nature, the second stage of the historical analysis is invoked to determine if the issue is of the sort that would have been tried to a jury in England in 1791.[43] Courts have not answered this second inquiry by searching for an analogous issue that would have been tried to an eighteenth-century jury. If the legal issue was tried before English

tried to a judge; once the court had jurisdiction in equity, it could invoke the doctrine of "equitable clean-up" to decide the entire case, including legal issues which would have been entitled to a jury trial if raised in a separate suit at common law. *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509-10 (1959).

The Federal Rules of Civil Procedure, enacted in 1938, abolished the distinction between actions at law and suits in equity, *see* FED. R. CIV. P. 2, thus enabling parties to combine legal and equitable claims. *Id.* Rule 18. These rules left open the question of which issues would be tried to a jury or, if an action involved both issues triable by a jury and triable by a judge, which issues would be tried first.

The Supreme Court sought to clarify this confusion in the following cases: Ross v. Bernhard, 396 U.S. 531, 538 (1970) (jury trial questions depend upon the nature of the issue to be tried rather than the character of the overall action); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472-73 (1962) (parties did not lose their seventh amendment rights when legal and equitable issues were mixed); and Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 508-11 (1959) (legal and equitable issues in an action involved common factual question; these questions were to be tried first to a jury).

The third factor enunciated in footnote 10 of *Ross*, 396 U.S. at 539 n.10, practical abilities and limitations of juries, has led to some confusion because there is no precedent for employing such a variable in seventh amendment analysis. *See* Jorde, *supra* note 11, at 27. Generally, however, the lower courts have ignored the *Ross* footnote. C. WRIGHT, LAW OF FEDERAL COURTS 614 (4th ed. 1983).

37. *See supra* notes 19-20 & accompanying text.

38. *See* Kane, *supra* note 1, at 11; Note, *supra* note 25, at 129-30.

39. Jorde, *supra* note 11, at 6-17. *See generally* 5 J. MOORE, *supra* note 36, ¶ 38.05[5]; Wolfram, supra note 1, at 640.

40. *See* Jorde, *supra* note 11, at 8-9.

41. *Ross*, 396 U.S. at 538 n.10; *see supra* text accompanying note 36.

42. *See supra* text accompanying notes 24-30.

43. *See* Jorde, *supra* note 11, at 9-17. Not every issue in a common-law action was tried by a jury. Certain issues were decided by common-law judges without the aid of a jury. *See* 5 J. MOORE, *supra* note 36, ¶ 38.08[5-6]; Wolfram, *supra* note 1, at 640.

juries in 1791, then there is a right to jury trial; if not, then there is no such right.[44]

Ninth Circuit's Application of the Historic Issue Test

In *Standard Oil Co. v. Arizona*,[45] the states of Arizona, California, Florida, Oregon, and Washington brought separate actions charging major oil companies with conspiracy to fix prices of refined petroleum products. The states brought suit in their proprietary capacities, as class representatives, and as parens patriae.[46] After these actions were trans-

44. Jorde, *supra* note 11, at 9-17. Professor Kane has suggested that although seventh amendment decisions appear to expand the constitutional right to jury trial whenever the issue is legal, these rulings should not be read too broadly. Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 423-24 n.197 (1982). Professor Kane states that, in these cases, the Court did not rule on actions that could not be brought in the common-law courts regardless of the procedures available; the Court only considered whether, in view of modern procedural devices, a historically equitable action, such as a derivative suit, could be tried to a jury when the action presented issues of a legal nature. *Id.* (citing *Ross*, 396 U.S. 531; Beacon Theatres, Inc. v. Westover, 396 U.S. 469 (1962); Dairy Queen, Inc. v. Wood, 359 U.S. 500 (1959)).

The Federal Rules of Civil Procedure also envision that courts will decide the scope of the seventh amendment right to jury trial on an issue by issue basis. FED. R. CIV. P. 38(b) ("[A]ny party may demand a trial by jury of any *issue* triable of right by a jury . . . ." (emphasis added)).

45. 738 F.2d 1021 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 815 (1985).

46. *Id.* at 1022. The Ninth Circuit also relied upon the fact that the state was suing as parens patriae to strengthen its conclusion, based on its application of the historic issue test, that the state may invoke the protections of the seventh amendment. The court stated that, because the states were suing as representatives of their citizens, it would be anomalous to deny the states the right to jury trial when citizens would have the right to jury trial if suing individually. *Standard Oil*, 738 F.2d at 1030-31.

The parens patriae doctrine developed in England for the protection of the rights of three groups: children, mental incompetents, and charities. The Crown as parens patriae would bring suit on their behalves. "American case law has developed another aspect of the parens patriae power, the state's actions as 'quasi-sovereign.' This theory permits that state to bring suit as a guardian of the well-being of its general populace . . . ." Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DE PAUL L. REV. 895, 895-98 (1976).

In addition to representing its citizens' interests, the state must exhibit a "quasi-sovereign" interest separate and apart from the interests of the particular private parties. 15 U.S.C. § 15(c) (1982). Quasi-sovereign interests have been defined as a set of interests that the state has in the well-being of its populace, sufficiently concrete to create an actual controversy between the state and the defendant. Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592, 602 (1982). Because a state acting as parens patriae must allege an interest separate and apart from the citizen's interests, the parens patriae concept should not be heavily relied upon to justify a state's right to jury trial.

The court also relied on EEOC v. Corry Jamestown Corp., 719 F.2d 1219 (3d Cir. 1983), for the proposition that the right to jury trial should not be affected by the fact that suit is brought by someone in representative capacity. *Corry Jamestown* is not strong precedent for this proposition because the EEOC's right to jury trial was based on statutory grounds. The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1982), specifically provided that a "person," one who is entitled to sue and to a jury trial under the ADEA,

ferred to the United States District Court for the Central District of California for coordinated pretrial proceedings, the states demanded a jury trial of the legal issues in their antitrust actions.[47] The oil companies moved to strike the jury demand, arguing that the seventh amendment guarantee does not extend to states as litigants.[48] The district court held that states have a right to jury trial of legal issues under the seventh amendment,[49] and the oil companies appealed to the Ninth Circuit.[50]

Consistent with the maxim that, when possible, courts must resolve cases on statutory grounds before reaching constitutional questions,[51] the Ninth Circuit first addressed the question of whether the federal antitrust statutes[52] provided for a right to jury trial. The court found that neither Congress nor the Supreme Court had ever faced this issue.[53] Based on its review of legislative history and Supreme Court precedent, the court concluded that "no right to jury trial flows directly from the antitrust laws."[54]

Unable to determine a state's jury trial rights in antitrust actions on statutory grounds, the court analyzed the issue under the seventh amendment. In accordance with the traditional formulation of the historic issue test, the Ninth Circuit stated that that test involved two inquiries: whether the issues are legal and, if so, whether they are of the sort that would have been tried by English juries in 1791.[55] The court, construing this test, then stated that it must first decide "whether the issues involved are legal in nature and second, if actions brought by government entities were tried to juries in 1791."[56] As to the first inquiry, the court held that antitrust suits involve legal issues.[57]

The court explained that the second inquiry was necessary because even issues "legal" in nature were sometimes tried to a judge, not by a jury, in England in 1791.[58] The court stated that the right to jury trial in eighteenth-century England could turn on "matters such as sovereign

includes those acting as a "legal representative." *Id.* § 630(a). The Third Circuit reasoned that the EEOC was suing as a "legal representative" and, therefore, was entitled to a jury trial. *Corry Jamestown*, 719 F.2d at 1223-24.

47. *Standard Oil,* 738 F.2d at 1022.

48. *Id.*

49. *Id.*

50. *Id.*

51. *See* Escambia County v. McMillan, 466 U.S. 48, 51 (1984) (per curiam); Lorillard v. Pons, 434 U.S. 575, 577 (1978).

52. Federal antitrust statutes include the Sherman Act, 15 U.S.C. §§ 1-7 (1982), and the Clayton Act, 15 U.S.C. §§ 12-27 (1982).

53. *Standard Oil*, 738 F.2d at 1023-25.

54. *Id.*

55. *Id.* at 1027.

56. *Id.*

57. *Id.*

58. *Id.* at 1026.

immunity which are extraneous to the legal-equitable distinction."[59]

Thus, in order to answer the second inquiry—a determination of whether legal actions brought by state governments were tried to juries in eighteenth-century England—the Ninth Circuit reasoned by analogy because there were no states in eighteenth-century England.[60] The court found that the state is analogous to the Crown because both entities are in similar legal positions in their respective systems of government and both are sovereign entities that cannot be sued without consent.[61] The court then stated that the Crown was entitled to a jury trial on demand in England in 1791.[62] Supporting this conclusion, the court cited four English cases[63] and quoted a passage from a Third Circuit case, *EEOC v. Corry Jamestown Corp.*[64] The Ninth Circuit then concluded that, under the historic issue test, the state could invoke the seventh amendment guarantee.[65]

The Ninth Circuit's reasoning is flawed in several respects: first, the court departed from precedent in its application of the historic issue test, in particular by employing historical party analogues in the second-stage historical analysis; second, the court incorrectly analogized the state to the Crown; and third, the court failed to support adequately its conclusion that the Crown had a right to jury trial in England in 1791.

First, while the Ninth Circuit stated the historic issue test correctly in the abstract, it incorrectly applied that test. Expounding the historic issue test in the abstract, the court properly stated that the two inquiries required by that test were whether the *issues* involved were legal and, if so, whether these legal *issues* would have been tried to a jury in eighteenth-century England.[66] In the paragraph immediately following that statement, however, the court, paraphrasing the test in the context of the issue before it, framed the second inquiry as a determination of whether "actions brought by government entities were tried to juries in 1791."[67]

59. *Id.*

60. *Id.* at 1027.

61. *Id.* at 1026.

62. *Id.* at 1027-28.

63. *Id.* at 1028 (citing Rex v. Peto, 148 Eng. Rep. 577 (Exch. 1826); The King v. Humphrey, 148 Eng. Rep. 371 (Exch. 1825); The King v. Marsh, 145 Eng. Rep. 824 (Exch. 1793); The King v. Cotton, 145 Eng. Rep. 729 (Exch. 1751)).

64. 719 F.2d 1219 (3d Cir. 1983). "At common law, the jury was developed not merely as a protection of the individual, but also by the monarchs for their use. Indeed, after the Norman Conquest juries were 'the prerogative rights of Frankish kings.' " *Id.* at 1224 (quoting 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 140 (2d ed. 1898 & photo. reprint 1952)). The Third Circuit held in this case that the Equal Employment Opportunity Commission ("EEOC") is entitled to a jury trial when it brings suit on behalf of an individual employee for violations under the ADEA, 29 U.S.C. §§ 621-634 (1982). *Corry Jamestown*, 719 F.2d at 1224-25.

65. *Standard Oil*, 738 F.2d at 1028.

66. *Id.* at 1027.

67. *Id.*

The first indication of a flaw in the Ninth Circuit's reasoning, this statement contravenes precedent by focusing on the *action* rather than the *issue*, echoing the historical approach rejected by the Court in *Ross*.[68]

Furthermore, as a result of framing the second inquiry as it did, the Ninth Circuit's reasoning took two further unprecedented turns: first, injection of the identity of the demanding litigant into the historic issue test; and second, reasoning by historical party analogies rather than reasoning by historical issue analogies.[69] Research does not reveal a single case in which a court has searched for historical party analogues, in either the first or second stage of the historic issue test. In addition, courts have searched only for historical *issue* analogues and have only done so in the first-stage historical inquiry, which is the determination of whether the issue is legal in nature.[70] Thus, while precedent exists for basing the right to jury trial on whether an analogous issue carried such a right in England in 1791, precedent does not exist for basing a jury trial right on whether an analogous *party* had such a right in England in 1791. One justification for this unprecedented reasoning could be that only by such broadening of the focus of the historic issue test could the court squarely address the issue of whether a state has a seventh amendment right to jury trial.[71] If the Ninth Circuit properly had formulated the second inquiry as applied to this case, the inquiry would have been whether antitrust *issues*, deemed legal in nature as a result of the first inquiry, would have been tried to a jury in eighteenth-century England.

Second, while unprecedented reasoning may not be inherently improper, the Ninth Circuit analogized incorrectly. The court found that the state was analogous to the Crown because both entities are in similar legal positions in their respective systems of government and because both are sovereign entities. Contrary to the Ninth Circuit's conclusion, however, a state as a litigant is not analogous to the Crown as a litigant. While the state and the Crown are in the same legal position in their respective systems of government to the extent that both are governmental entities and both enjoy some measure of sovereign immunity, the state and the Crown are different types of governmental entities and enjoy different kinds of sovereignty. The Crown is a national sovereign, while the state operates in a system of dual sovereignty and is sovereign only

68. *See* Ross v. Bernhard, 396 U.S. 531, 538 (1970); *supra* text accompanying notes 31-38.

69. *See supra* notes 24-30 & accompanying text.

70. *See supra* notes 24-30 & accompanying text.

71. In United States v. New Mexico, 642 F.2d 397 (10th Cir. 1981), the Tenth Circuit applied the historic issue test as traditionally formulated to determine whether a state has a seventh amendment right to jury trial. Because the traditional historic issue test focuses only on the issues involved, the court was unable to squarely address the issue of a state's seventh amendment rights, although it purported to do so. *See infra* text accompanying notes 111-24.

within its jurisdiction.[72] As a result, the state is unable to exert the same degree of control and influence over the federal court system that the English sovereign exerted over the English courts.[73] In particular, the Crown and the state differ with respect to their ability to influence laws adjudicated in the national courts and the judges sitting therein.[74]

The Crown influenced the formulation of all laws that were adjudicated in the English courts;[75] states, on the other hand, may influence the law adjudicated in the federal courts to a more limited extent. Because federal subject matter jurisdiction can be predicated on both diversity[76] and federal question jurisdiction,[77] both state and federal law are adjudicated in the federal courts.[78] While states control the formulation of state laws, they cannot directly influence the formulation of federal laws.

In addition, the English sovereign was capable of exerting substantial influence over the judges in its courts. The judges of the king's courts

72. The state operates in a system of dual sovereignty because the government of the United States is a federal system. B. BLANK, AMERICAN GOVERNMENT AND POLITICS 59-60 (1973); S. DAVIS, THE FEDERAL PRINCIPLE 121-22 (1978); W. MUNRO, THE GOVERNMENT OF THE UNITED STATES 433-34 (3d ed. 1927). In other words, power is divided between two popularly elected governments, a natural government that is sovereign within the whole territory of the nation and a state government that is sovereign only within the territory of the state. W. BENNETT, AMERICAN THEORIES OF FEDERALISM 122-27 (1964); B. BLANK, *supra*, at 59-60; S. DAVIS, *supra*, at 121-22; W. MUNRO, *supra*, at 433-46.

Although the principle of national supremacy will prevail when a state and national actions are in conflict, S. DAVIS, *supra*, at 122; W. MUNRO, *supra*, at 433-35, each state is sovereign because it has the original and complete authority over things within its jurisdiction. *Id.* at 435. As Chief Justice Marshall aptly explained: " 'In America,' . . . 'the powers of sovereignty are divided between the government of the Union and those of the states. They are each sovereign with respect to the rights committed to it, and neither is sovereign with respect to the rights committed to the other.' " *Id.* at 435 (quoting McCulloch v. Maryland, 17 U.S. 316, 410 (1819)).

73. *See infra* notes 75-81 & accompanying text.

74. *See infra* notes 75-81 & accompanying text.

75. *See* J. EHRLICH, EHRLICH'S BLACKSTONE 66-68 (1959); 1 F. POLLOCK & F. MAITLAND, *supra* note 64, at 140.

76. Diversity jurisdiction is found when the controversy is between citizens of different states or between a citizen of a state and an alien, 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3601 (1984), and the amount in controversy exceeds $10,000. 28 U.S.C. § 1332(a) (1982).

77. The Constitution provides that federal courts may be given jurisdiction over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST. art. III, § 2, cl. 1. Cases that fall under this heading of jurisdiction are usually spoken of as involving a "federal question." Original jurisdiction is conferred upon the federal courts over cases involving questions of federal law. 28 U.S.C § 1331 (1982). For a more complete discussion of federal question jurisdiction, see C. WRIGHT, *supra* note 36, at 90-126.

78. As a result of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), federal courts in diversity cases apply state substantive law through federal procedure. The Supreme Court consistently has held that the right to jury trial is determined by reference to federal law. *E.g.*, Simler v. Conner, 372 U.S. 221, 222 (1963) (When the seventh amendment requires, but state law denies, a jury trial, the federal court must allow the jury trial.).

were the king's servants; he appointed and could dismiss them at a moment's notice.[79] In contrast, the state governments have no power either to appoint or to dismiss federal judges.[80]

The differences in the governmental nature of the Crown and state and their influence over their national court systems undercuts the analogy between the two entities. These differences also indicate that the protection afforded by jury trial against undue governmental influence over the national court system is more applicable to the Crown than to the state.[81]

The sovereign immunity granted to the states by the eleventh amendment to the United States Constitution[82] also differs significantly from that enjoyed by the English sovereign. The English sovereign enjoys absolute sovereign immunity; it can never be sued without its consent.[83] The immunity granted by the eleventh amendment to the states,[84] however, is limited: a state may be sued in federal court without its consent in at least four situations.[85]

79. J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 143-46 (2d ed. 1979).

80. U.S. CONST. art. II, § 2, cl. 2. The President shall appoint federal judges.

81. *See infra* text accompanying notes 157-85.

82. U.S. CONST. amend. XI.

83. At common law, the Crown could not be sued *eo nomine* without his consent. 11 HALSBURY, *supra* note 20, ¶ 1401; Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1, 3, 5-6 (1963). Before passage of the Crown Proceedings Act of 1947, 10 & 11 Geo. 6, ch. 44, §§ 1, 42, the only methods of redress against the Crown were by way of a petition of right requiring the Crown's consent, 11 HALSBURY, *supra* note 20, ¶ 1401; Jaffe, *supra*, at 1, 3, by suits against the Attorney General for a declaration, or by actions as ministers and government departments that had been incorporated or declared liable to suit by statute. 11 HALSBURY, *supra* note 20, ¶ 1401. *See generally id.* ¶ 969. The Crown Proceedings Act of 1947, 10 & 11 Geo. 6, ch.44, §§ 1, 42, enables civil proceedings to be taken against the Crown in the same circumstances as against a subject with certain exceptions. 11 HALSBURY, *supra* note 20, ¶ 1402; *see also* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 7 (1972); Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 153 n.69, 154 n.70 (1977).

84. The eleventh amendment was ratified in response to the unpopular decision of Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). In that case, the Supreme Court held that the Constitution permitted a citizen of one state to sue another state in federal court even though the state had not consented to such suit. The eleventh amendment has been interpreted to prohibit in federal court suits against a state by a citizen of another state, a citizen of the state itself, or an alien, except when the state has consented to suit. C. WRIGHT, *supra* note 36, at 767-68; *see Ex parte* Ayers, 123 U.S. 443, 487-92 (1887).

85. First, implied consent has been found when a state has acted under federal law. *E.g.*, Parden v. Terminal Ry., 377 U.S. 184, 186-87 (1964) (state commenced operation of a railroad after the enactment of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982)); Petty v. Tennessee-Missouri Bridge Comm., 359 U.S. 275, 276-78 (1959) (state acted under an interstate compact that had been approved by Congress). Second, Congress can remove a state's eleventh amendment immunity by legislation. *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 451-56 (1976). Third, the state's consent is not required in suits by one state against another. *E.g.*, South Dakota v. North Carolina, 192 U.S. 286, 315 (1904) (The state is deemed to have consented by accepting the Constitution, which grants federal jurisdiction over "controversies be-

Thus, the relationship between the Crown and its national courts in 1791 was significantly different from the relationship between the state and the federal courts in the United States today. The Crown was capable of exerting substantial influence over its national courts, while the state is relatively powerless to influence directly the federal court system. It follows then that the purposes underlying the establishment of trial by jury—protection against arbitrary government action influencing the judges of the national courts and the laws adjudicated therein as well as assurance of an impartial resolution of the facts[86]—are more applicable to the Crown rather than to the state.[87] These significant differences between the Crown and state as litigants indicate that the Crown is not the proper analogue to the state.[88]

Finally, even if the analogy to the Crown were proper, it is not clear that the Crown actually had a right to demand a jury trial in 1791. Research has not revealed one English case adjudicated around 1791 that shows that the Crown demanded, or even had the right to demand, a jury trial. While the Ninth Circuit cited four English cases to support its conclusion,[89] these cases neither confronted the issue of whether the Crown had the right to demand a jury trial nor mentioned which party demanded a jury trial.[90] In addition, a thorough reading of leading

tween two or more states." U.S. CONST. art. III, § 2.). Fourth, consent is not necessary in actions by the United States against a state. *E.g.*, United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 143 U.S. 621, 641-46 (1892); C. WRIGHT, *supra* note 36, at 274, 766-68.

86. *See infra* notes 157-67 & accompanying text.

87. *See infra* text accompanying notes 161-85.

88. "We must be careful not to attach too much importance to seeming analogies, or mistake partial resemblances for complete identity." W. FORSYTH, HISTORY OF TRIAL BY JURY 6 (2d ed. 1971).

89. *See supra* note 63 & accompanying text.

90. The facts of each case also fail to provide any support for the Ninth Circuit's conclusion that the Crown had the right to demand a jury trial in England in 1791. The case of Rex v. Peto, 148 Eng. Rep. 577 (Exch. 1826), involved an action for breach of contract for failure to perform in accordance with the specifications in the contract. The defendant claimed that he did not breach the contract because the surveyor directed him to vary from the original plan in the contract. The court ruled in favor of the Crown because the surveyor was not authorized to direct the defendant to deviate from the contract. *Id.* at 583-84.

The issue before the court in The King v. Humphrey, 148 Eng. Rep. 371 (Exch. 1825), was whether a wharfinger's general lien upon the goods of his customer in his possession for his balance shall prevail against an immediate extent issued against that customer being the king's debtor. *Id.* at 373. The court held that the Crown was bound by the custom of trade establishing that lien and, therefore, the Crown had the right to seize those goods only upon payment of the amount owed to the wharfinger by the customer. *Id.* at 380.

In The King v. Cotton, 145 Eng. Rep. 729 (Exch. 1793), the issue was whether goods taken in distress, but not yet sold, by a landlord for payment of rent past due can be seized on an extent for the King's own debt. Because goods distrained are in the custody of the law, *id.* at 732, and because of the general rule of preference to the King's debts, *id.* at 733, the court

English[91] and American[92] commentaries does not indicate whether the Crown had the right to demand a jury trial in eighteenth-century England.

The passage from the decision in *EEOC v. Corry Jamestown Corp.*[93] also fails to support the Ninth Circuit's conclusion that the Crown had a right to demand a jury trial. The passage from the *Corry Jamestown* decision describes twelfth-century inquisition practices rather than eighteenth-century trial by jury. While monarchs initially developed jury trial solely for their own use,[94] by the eighteenth century jury trial was a right afforded the individual against abuses by the Crown.[95] The jury's role in the twelfth century was that of an administrative fact finder for the Crown, closer to that of a witness than a jury in today's federal system.[96] The principle underlying jury trial was to get information useful to the Crown from those people most likely to have it.[97] Jurors came from the county where the crime or event occurred[98] and testified as to their

held that the King's extent, issued after the distress but before sale, shall prevail against the distress. *Id.* at 738.

The issue in The King v. Marsh, 145 Eng. Rep. 842 (Exch. 1793), was whether, in an action for breach of an indenture in discharge of recognizance, a defendant who pleads performance of the conditions contained therein is bound to produce the indenture itself. The court held that the defendant was required to produce the document unless he showed that it was destroyed or not in his possession. *Id.* at 843. Thus, because the defendant did not show any of these reasons for failure to produce the document, his plea was faulty. *Id.* While three of the four cases mention the word "jury," none of the cases specify who demanded the jury trial or the issue of the right to demand a jury trial. In addition, two of the cases, *Rex v. Peto* and *The King v. Humphrey*, were decided in the nineteenth century, a number of years after 1791.

91. The following English sources do not express or imply whether the Crown had the right to demand a jury trial in England in 1791: J. BAKER, *supra* note 79; W. BLACKSTONE, COMMENTARIES (G. Tucher 2d ed. 1969); E. COKE, INSTITUTES OF THE LAWS OF ENGLAND (1809); W. FORSYTH, *supra* note 88; M. HALE, PREROGATIVES OF THE KING (1976); M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND (C. Runnington 6th ed. 1820); 8, 11, 16, 36 & 37 HALSBURY, *supra* note 20; 1 W. HOLDSWORTH, *supra* note 36; C. LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY (1962); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (5th ed. 1956); H. STEPHENS, COMMENTARIES ON THE LAWS OF ENGLAND (1845); C. VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY (1746).

92. The following American commentaries do not specify whether the Crown had the right to demand a jury trial in eighteenth-century England: J. FRANK, COURTS ON TRIAL (1949); C. JACOBS, *supra* note 83; J. MOORE, *supra* note 36; L. MOORE, THE JURY (1973); 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971); 19 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (1985); Jaffe, *supra* note 83; Jorde, *supra* note 11; Kane, *supra* note 1.

93. 719 F.2d 1219, 1224 (3d Cir. 1983); *see supra* text accompanying note 64.

94. T. PLUCKNETT, *supra* note 91, at 110.

95. *See infra* text accompanying notes 101-10.

96. 1 F. POLLOCK & F. MAITLAND, *supra* note 64, at 138-40.

97. T. PLUCKNETT, *supra* note 91, at 109-11.

98. W. FORSYTH, *supra* note 88, at 102; T. PLUCKNETT, *supra* note 91, at 109-11, 127.

knowledge of the event.[99] Thus, trial by jury actually had no place in the ordinary procedure of England's old courts.[100]

Furthermore, contrary to the suggestion of the *Corry Jamestown* passage, while jury trial was the prerogative right of the monarchs of the twelfth century, it was not the prerogative right of kings in eighteenth-century England. Trial by jury was referred to as a "royal prerogative" in twelfth-century criminal cases because the defendant was not entitled to jury trial as a matter of right.[101] By the end of the seventeenth century, the right to jury trial was no longer a "royal prerogative."[102]

The process by which the "modern" jury evolved, in which jurors ceased to be witnesses and became judges of fact, did not begin until the Magna Carta in 1215[103] and was largely completed by the end of the fourteenth or fifteenth century.[104] The process of change indicates that trial by jury was not a right that would have been afforded the Crown. Chapter 39 of the Magna Carta, for example, declares, "no free man shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed . . . except by the lawful judgment of his peers and by the law of the land."[105] This statement, as well as other language in the Magna Carta, indicates that the right to jury trial belonged to the individual.[106] By 1468, according to Sir John Fortescue's description, jury trial closely resembled jury trial in modern form: the jury was a body of impartial men; evidence was presented by parties and counsel in open

99. W. FORSYTH, *supra* note 88, at 102; T. PLUCKNETT, *supra* note 91, at 127-29.

100. 1 F. POLLOCK & F. MAITLAND, *supra* note 64, at 140.

101. W. FORSYTH, *supra* note 88, at 362-63; T. PLUCKNETT, *supra* note 91, at 127-29. The defendant was entitled to jury trial by the king's grace and favor, which was obtained through the payment of money or chattels. It is also interesting to note that until 1772, a defendant in a criminal case could not waive jury trial. Without a jury trial, the defendant could not be acquitted or convicted; if never convicted, the defendant's goods and chattels could not be forfeited to the Crown. *Id.* at 125-26.

102. 1 B. SCHWARTZ, *supra* note 92, at 41-46.

103. C. LOVELL, *supra* note 91, at 115-16; L. MOORE, *supra* note 92, at 49-51; 1 B. SCHWARTZ, *supra* note 92, at 5-7. Professor Schwartz points out that whether the framers of the Magna Carta intended Chapter 39, declaring the right to jury trial, to be read as a guarantee of trial by jury to all men, the Magna Carta has ultimately had that effect. *Id.* Espousing a somewhat opposite view, Professor Wolfram argues that historians no longer "accept the Magna Carta pedigree for jury trial." Wolfram, *supra* note 1, at 653 n.44.

104. *See* J. BAKER, *supra* note 79, at 65; C. LOVELL, *supra* note 91, at 110; L. MOORE, *supra* note 92, at 59-60; T. PLUCKNETT, *supra* note 91, at 129-30.

105. 1 B. SCHWARTZ, *supra* note 92, at 5-7.

> [The] Magna Carta is primarily a feudal document directed against specific feudal abuses committed by the King against his tenants-in-chief. The wrongs done to the barons may have been the direct cause of the Magna Carta, but the language used was broad enough to protect the entire nation against government oppression.

Id.

106. *See* Wooster v. Plymouth, 62 N.H. 193, 196 (1882) ("By the express terms of the great charter, the right of trial by peers was not a security of the government, but a liberty granted by the sovereign to his free subjects.").

court; and witnesses were examined upon oath.[107] The English Bill of Rights of 1689[108] further secured jury trial as it is known today. Declaring the rights and liberties of the English citizens, it, among other things, ended the struggle against the existence of jury trial only through royal prerogative.[109] Additionally, English commentators also have concluded that trial by jury was a security afforded the individual against abuses by the Crown.[110]

Contrary to the Ninth Circuit's conclusion, English history indicates that trial by jury in 1791 was a protection afforded the individual against arbitrary abuses by the Crown. It was not an instrument for use by the Crown or a protection afforded the Crown against itself. Furthermore, English case law does not support the proposition that the Crown had a right to demand a jury trial in 1791.

In sum, the Ninth Circuit's approach is inadequate because the court, in an abrupt and unexplained departure from precedent, searched for historical analogues to the parties rather than to the issues involved. Moreover, the court incorrectly analogized the state to the Crown, ignoring the fundamental differences in the two types of sovereigns. Finally, even if the analogy were proper, the court's assertion that the Crown had the right to demand a jury trial in England in 1791 is historically inaccurate. Another court faced with the same issue would find little guidance in the reasoning in *Standard Oil* and easily could reach the opposite conclusion. Even if another court agreed with the injection of party analogues into the second stage of the historic issue test and also agreed with

107. T. PLUCKNETT, *supra* note 91, at 129-30. In contrast to Sir John Fortescue, Plucknett believed that trial by jury assumed its modern form by the seventeenth century. *Id.* at 129-30. He noted that, while Fortescue's picture of jury trial was "becoming the practice" in the fifteenth century, "relics" of the older form of jury trial survived occasionally. *Id.*

108. 2 W. & M., ch. 2; *see* 1 B. SCHWARTZ, *supra* note 92, at 40-43.

109. 1 B. SCHWARTZ, *supra* note 92, at 41-46; *see also* J. EHRLICH, *supra* note 75, at 45-48, 52-53.

110. Forsyth stated that the jury was a bulwark against arbitrary action on the part of the Crown. W. FORSYTH, *supra* note 88, at 426. "The trial by jury is that point of their liberty to which the people of England are most thoroughly and universally wedded." Wooster v. Plymouth, 62 N.H. 193, 195 (1882) (citing DE LAUDIBUS CONST., ch. 13, para. 136)).

The framers of the United States Constitution also regarded the jury trial as a right of the citizens and not of the federal government. Hamilton wrote:

> "A declaration of rights," says Hamilton, "under our constitution must be intended to limit the power of the government itself. It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was the Magna Charta, obtained by the barons, sword in hand, from King John . . . . Such, also, was the declaration of right presented by the lords and commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the bill of rights."

Wooster, 62 N.H. at 199-200 (quoting THE FEDERALIST No. 84, at 558 (A. Hamilton) (R. Luce ed. 1976)).

the analogy between the state and the Crown, there is no sound historical basis for finding that the Crown had a right to demand a jury trial in England in 1791. The lack of sufficient evidence showing that the Crown actually had a right to jury trial might persuade a court to conclude that the state, as a party analogous to the Crown, would not have the right to demand a jury trial. In addition, the Ninth Circuit's analysis provides no guidance to a court that might reject the analogy between the state and the Crown.

If another court were to reject the use of party analogues, the court would apply the traditional formulation of the historic issue test. The next section analyzes the effectiveness of the traditional historic issue test as a method to resolve the issue of a state's right to jury trial under the seventh amendment.

Traditional Application of the Historic Issue Test

The inadequacy of the Ninth Circuit's interpretation of the historic issue test to provide solid precedent for the determination of a state's seventh amendment rights begs the question of whether the traditional interpretation of that test would provide a more sound basis for resolution of that issue. In *United States v. New Mexico*,[111] the Tenth Circuit applied the traditional historic issue test in a federal tax suit against New Mexico and concluded that the states had a seventh amendment right to demand a jury trial.[112] Using *New Mexico* as an example, this section analyzes whether that test is an effective method to determine a state's jury trial rights.

In *New Mexico*, the United States sued the State of New Mexico for assessing and collecting an allegedly unauthorized tax against a private contractor employed by the federal government. The federal district court denied New Mexico's jury trial request.[113] On appeal, the Tenth Circuit applied the traditional historic issue test to determine whether the state had a seventh amendment right to jury trial.[114]

The Tenth Circuit first analyzed whether the tax refund suit was legal or equitable in nature.[115] In accordance with the first stage of the traditional historic issue test, the court applied the three-part test set out in the *Ross* footnote[116] and concluded that the issue presented was legal

111. 642 F.2d 397 (10th Cir. 1981).

112. *Id.* at 400-02.

113. *Id.* at 398.

114. *Id.* at 399.

115. Although state law was in dispute, the court properly referred to federal law to determine whether there was a seventh amendment right for this issue. *Id.* (citing Simler v. Conner, 372 U.S. 221, 222 (1963)).

116. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970); *see supra* text accompanying note 36.

in nature.[117] Answering the second inquiry of the traditional historic issue test, the Court then, examining English and American precedent, determined that tax refund suits instituted by individual taxpayers are the sort of actions that would have been tried to English juries in 1791.[118] To reaffirm this common-law recognition of a right to jury trial, the Tenth Circuit noted that a federal statute[119] provided for a right to jury trial on demand by either party in suits against the United States for the recovery of taxes wrongfully collected.[120] The court reasoned that it would be anomalous for the federal government to recognize the right of jury trial in tax refund cases in which the United States is a defendant, but not in cases in which it is a plaintiff.[121] Thus, the Tenth Circuit concluded that, as the defendant in the action, the state should have the right to demand a jury trial.[122]

Although the Tenth Circuit examined the different nature of the jury trial rights of the United States and of individuals, the court failed to discuss the significance of the fact that a state government made the jury trial demand. The Tenth Circuit did not enunciate its reasoning or provide support for its assertion that the seventh amendment guarantee extended to states; rather, it determined only that the issue involved was triable to a jury under the historic issue test.

Because the court routinely applied the traditional interpretation of the historic issue test, the issue of a state's jury trial rights was not a factor in the decision. As currently formulated, that test only focuses on the issues underlying the action.[123] It does not provide a framework or methodology for deciding whether, if the issue satisfies both stages of the traditional historic issue test, the state litigant may demand a jury trial for that issue.

The *New Mexico* decision, which completely fails to address whether the seventh amendment guarantee extends to states, cannot be dispositive of that issue. The *New Mexico* decision demonstrates that the historic issue test is an inadequate method of determining a state's seventh amendment rights. The nature of the state as the demanding litigant must be examined to ensure consonance with the purposes of the seventh amendment: fair and impartial resolution of factual issues and

117. *New Mexico*, 642 F.2d at 399-401.

118. *Id.* at 400-01.

119. 28 U.S.C. § 2402 (1982) provides that "[a]ny action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury." *Id.* Section 1346(a)(1) provides that federal courts have jurisdiction over court claims against the United States for the recovery of taxes wrongfully collected. *Id.* § 1346(a)(1).

120. *New Mexico*, 642 F.2d at 401.

121. *Id.*

122. *Id.* at 402.

123. *See supra* notes 39-44 & accompanying text.

protection against governmental abuses.[124]

Interpretation of the Historic Issue Test in Foreign Sovereign Immunities Act Cases

As an alternative to the traditional formulation[125] and the Ninth Circuit's interpretation[126] of the historic issue test, another possible approach to determining a state litigant's seventh amendment rights is to apply the broad interpretation of the historic issue test as formulated in cases challenging the constitutionality of the nonjury trial provision of the Foreign Sovereign Immunities Act.[127] In those cases,[128] several circuit courts have recognized the need to consider the governmental nature of a foreign sovereign in determining a litigant's jury trial rights in a suit against a foreign sovereign. Upholding the constitutionality of the nonjury trial provision of the FSIA, these courts deviated from the traditional historic issue test by focusing on the action as a whole rather than on the specific issues.[129] In other words, these courts determined whether the action was a suit at common law in England in 1791, not whether the legal issue was tried to an eighteenth-century English jury.[130] This broad interpretation of the second stage of the historic issue test differs from the Ninth Circuit's interpretation of that test because the approach in the FSIA cases does not involve a search for party analogues.[131] Rather, the FSIA analysis looks at all components of the existent action, including the nature of the parties and relief sought.[132]

By applying a broad interpretation of the second stage of the historic issue test in the FSIA cases, the Second,[133] Third,[134] and Fourth[135] Cir-

124. *See infra* text accompanying notes 157-67.

125. *See supra* notes 111-22 & accompanying text.

126. *See supra* notes 51-65 & accompanying text.

127. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a)(2), (4), 1391 (f), 1441(d), 1602-1611 (1982). Section 1330 precludes jury trials in suits against foreign sovereigns. *Id.* § 1330.

128. Rex v. Compania Peruana de Vapores, S.A., 660 F.2d 61, 67-69 (3d Cir. 1981); Williams v. Shipping Corp. of India, 653 F.2d 875, 881-83 (4th Cir. 1981); Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui," 639 F.2d 872, 878-81 (2d Cir. 1981).

129. *See supra* notes 39-44 & accompanying text.

130. Rex v. Compania Peruana de Vapores, S.A., 660 F.2d 61, 67-69 (3d Cir. 1981); Williams v. Shipping Corp. of India, 653 F.2d 875, 881-83 (4th Cir. 1981); Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui," 639 F.2d 872, 878-81 (2d Cir. 1981).

131. *See supra* notes 58-65 & accompanying text.

132. Rex v. Compania Peruana de Vapores, S.A., 660 F.2d 61, 63-67 (3d Cir. 1981); Williams v. Shipping Corp. of India, 653 F.2d 875, 881-83 (4th Cir. 1981); Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui," 639 F.2d 872, 879 (2d Cir. 1981).

133. Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui," 639 F.2d 872 (2d Cir. 1981).

134. Rex v. Compania Peruana de Vapores, 660 F.2d 61 (3d Cir. 1981).

135. Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981).

cuits have reasoned that, because immunity precluded actions against foreign sovereigns in eighteenth-century England, such actions did not exist at common law in 1791.[136] Consequently, there could have been no right to jury trial in such actions. Thus, these circuits have held that, because a suit against a foreign sovereign was not a suit at common law, the nonjury trial provision of the FSIA is consistent with the seventh amendment.[137] As one commentator noted, "[O]ne cannot preserve what never existed."[138]

When applied to the issue of whether a state litigant in federal court has a right to jury trial, the formulation of the second stage of the historic issue test in FSIA cases leads to the conclusion that the state does not have such a right. Parallel to the reasoning of the FSIA cases, this result follows because the American concept of state government did not exist in England in 1791. Thus, regardless of the underlying cause of action, a state could not demand a jury trial under this analysis.

The FSIA formulation, however, does not determine a state's jury trial rights satisfactorily because it leads to an illogical result on the question of whether private litigants have a jury trial right in actions to which a state is also a party. Because the FSIA cases justify the constitutionality of the FSIA's nonjury trial provision on the basis that there was no cause of action against foreign sovereigns in eighteenth-century England, the same reasoning would deny a jury trial right to a private litigant in an action against a state on the grounds that no cause of action existed against the state because the state did not exist in 1791. This result would contravene the well-established jury trial right of private litigants whenever the state is an opposing party.[139] Furthermore, the FSIA analysis as applied to this issue is unsatisfactory because it would resolve it based upon the nonexistence of a particular litigant in eighteenth-century England rather than upon the fact that the right to jury trial did not exist. The broad application of the historic issue test in FSIA cases fails to consider whether the demanding litigant would have had the right to jury trial in 1791 based on the issues involved, had that litigant existed at that time. Because the FSIA formulation of the historic issue test fails to provide a sound basis for the determination of a state's jury trial rights, it should not be relied upon for resolution of that issue.

136. Rex v. Compania Peruana de Vapores, 660 F.2d 61, 67-68 (3d Cir. 1981); Williams v. Shipping Corp. of India, 653 F.2d 875, 881 (3d Cir. 1981); Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui," 639 F.2d 872, 879 (2d Cir. 1981).

137. Rex v. Compania Peruana de Vapores, 660 F.2d 61, 69 (3d Cir. 1981); Williams v. Shipping Corp. of India, 653 F.2d 875, 883 (3d Cir. 1981); Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui," 639 F.2d 872, 879 (2d Cir. 1981).

138. Kane, *supra* note 44, at 423.

139. *See supra* notes 39-44 & accompanying text.

Policy Considerations Underlying the Seventh Amendment

As shown above, reference to eighteenth-century England fails to define a state's jury trial rights under the seventh amendment. The historic issue test, as applied traditionally,[140] or by the Ninth Circuit,[141] or in the FSIA cases,[142] fails to resolve adequately the issue of whether a state government has a right to demand a jury trial under the seventh amendment.

When reference to English history fails to resolve seventh amendment jury trial questions, as demonstrated above, courts should resort to policy considerations underlying the seventh amendment.[143] The Supreme Court on several occasions has decided jury trial issues by referring to policy underlying the seventh amendment when reference to English history failed to resolve the issue. In fact, several key developments in the interpretation of the seventh amendment have sprung from the impact of procedural reform on historical distinctions.

For example, in *Beacon Theatres, Inc. v. Westover*[144] the Supreme Court established that historical rules should be applied in light of modern procedure.[145] In that case, the Court tolled the death knell for the equitable clean-up doctrine, which permitted ancient courts of equity to retain jurisdiction over and dispose of equitable claims even though, in so doing, legal issues also were decided.[146] The *Beacon Theatres* Court reasoned that the justification for equity's deciding legal issues once it obtains jurisdiction must be reevaluated in light of the expansion of adequate legal remedies and the liberal joinder provisions provided by the Declaratory Judgment Act[147] and the Federal Rules of Civil Procedure.[148] Thus, the Court held that when legal and equitable claims are joined in one action and share common issues, the legal claim should be tried first in order to avoid depriving the party of a determination by jury of the common issue.[149] By rejecting the equitable clean-up doctrine, this conclusion permits jury trial in cases that historically had been tried in equity. The *Beacon Theatres* Court, therefore, considered changes in modern procedure and the policy favoring jury trial,[150] rather than ex-

140. *See supra* notes 111-22 & accompanying text.
141. *See supra* notes 51-65 & accompanying text.
142. *See supra* notes 127-39 & accompanying text.
143. C. WRIGHT, *supra* note 36, at 612.
144. 359 U.S. 500 (1959).
145. *Id.* at 507.
146. *Id.* at 509-10; *see* Kane, *supra* note 1, at 8.
147. *See* 28 U.S.C. §§ 2201-2202 (1982).
148. 359 U.S. at 510; *see* FED. R. CIV. P. 18(a).
149. *Beacon Theatres*, 359 U.S. at 510.
150. *Id.* at 510 n.18. Prior to *Beacon Theatres*, the Court analyzed policy considerations in upholding the constitutionality of a six-person jury in criminal cases. Williams v. Florida, 399 U.S. 78, 99-100 (1970).

clusively relying on the common law of England in 1791.

The Court in *Ross v. Bernhard*[151] deviated from history and precedent by treating the derivative action as involving severable claims and by injecting policy considerations in well-known footnote ten.[152] By including "the practical abilities and limitations of juries" as a factor in determining the "legal" nature of an issue,[153] the *Ross* Court injected policy considerations in the resolution of seventh amendment questions.[154] It has been asserted that the extension of the jury trial right in *Ross* was not dictated by the seventh amendment, but instead represented a policy decision by the Court favoring jury trial in civil actions.[155]

Because reference to English history fails to resolve the issue of whether a state has a seventh amendment right to jury trial, policy considerations underlying the seventh amendment should form a basis for determining that issue. Thus, a state should have the right to demand a jury trial only if extension of the seventh amendment protection to states is consistent with, and in furtherance of, the policies and purposes behind trial by jury. This would ensure a result that is consistent with the purposes of that amendment and would provide a sound precedential basis for possible future adjudications of the issue. In contrast to any of the interpretations of the historic issue test discussed above, an analysis based on policy considerations allows a court to focus directly on whether the seventh amendment guarantee extends to a state litigant.

Because the issue of a state litigant's jury trial right is not reached unless the issues underlying the action are appropriate for a jury trial, the threshold question nevertheless is whether the traditional historic issue test provides for a seventh amendment right to jury trial of the issues underlying the action.[156] Only if the issue satisfies the historic issue test is the question of a state's right to demand a jury trial of that issue reached. The inquiry then must be whether granting the state the right

151. 396 U.S. 531 (1970). For a more thorough discussion of this case, see *supra* text accompanying notes 31-37.

152. *Ross*, 396 U.S. at 538 n.10; *see supra* text accompanying notes 36-37; *see also* Note, *Jury Trial in a Stockholders' Derivative Suit*, 65 NW. U.L. REV. 697, 700 (1970); Note, *supra* note 25, at 118 (citing *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 174-76 (1970)).

153. *Ross*, 396 U.S. at 538 n.10.

154. *See* Kane, *supra* note 1, at 11; Wolfram, *supra* note 1, at 644.

155. Kane, *supra* note 1, at 11-12. Professor Wright asserts that the *Ross* Court's injection of policy considerations spurred the argument that juries should not be used in complex cases of great duration. C. WRIGHT, *supra* note 36, at 614-15.

Other commentators have questioned whether examining the state of the law almost two centuries ago can really aid the resolution of jury trial issues. *See, e.g.*, Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442 (1971). Professors Shapiro and Coquillette assert that since there were significant changes in process in the relationship between law and equity in England in 1791, "[a]ny snapshot of the English system as of 1791 is therefore likely to be misleading and, in any event, of little utility in coping with present-day problems." *Id.* at 449.

156. *See supra* notes 39-44 & accompanying text.

to demand a jury trial is consistent with, and in furtherance of, the purposes of trial by jury. Thus, analysis of a state litigant's seventh amendment rights is an issue separate and distinct from that of whether the issues underlying the action carry a jury trial right.

Trial by jury was established in England and in the United States for two main purposes.[157] The first purpose was to ensure a fair and impartial resolution of factual questions.[158] The jury, a group of twelve impartial persons, protects against the possible biases of the judge.[159] Commentators have asserted that a judgment of twelve persons brings about a more equitable resolution of factual issues than a judgment of one person.[160]

157. Judge Jerome Frank lists and then refutes the following eight purported purposes of civil jury trial. The first purported purpose of jury trial is that juries are better fact finders than judges. Judge Frank argues that if this were so, then judge trials should not be permitted. J. FRANK, *supra* note 92, at 126. Furthermore, he asserts that the practice of directed verdicts recognizes that juries may return verdicts which no reasonable man would consider justified by the evidence. *Id.* at 126-27. The second purpose is to have jurors serve as legislators and nullify unjust rules. *Id.* at 127. Judge Frank contends that there is no basis in fact that jurors are especially equipped to know the "social sense of what is right." *Id.* at 130. The third purpose of jury trial is to protect against corrupt or incompetent trial judges. *Id.* at 135. Judge Frank argues that resort to juries for this purpose is a "feeble device," because in many cases, "the litigant cannot have a jury trial, [and] must try his case before a judge without a jury." *Id.* The fourth purpose is to educate and create confidence in the government. *Id.* Judge Frank argues that this purpose cannot actually be proved. *Id.* The fifth purpose is to satisfy the citizens' demand for participation in government. *Id.* at 135-36. In response, Judge Frank points to the large number of citizens who seek to be excused from jury service. *Id.* at 136. Judge Frank argues that the sixth purpose, jury trial as popular entertainment, is antiquated. *Id.* He summarily disagrees with the seventh purpose, that juries are a means of necessary humane individualization. *Id.* Judge Frank labels the eighth purpose of jury trial to "provide buffers to judges against popular indignation aroused by unpopular decision," and "ingenious rationalization." *Id.* at 136-37. He points out that judges are obliged to accept public criticism in the many cases in which there is no jury. *Id.* at 137.

158. For support for this purpose as a reason for the establishment of the seventh amendment right to jury trial, see Colgrove v. Battin, 413 U.S. 149, 157 (1973). *See also* Gasoline Prods. Co. v. Champlin Co., 283 U.S. 494, 498 (1931); EEOC v. Corry Jamestown Corp., 719 F.2d 1219, 1224 (3d Cir. 1983). It has been asserted that juries are better fact finders than judges because jurors come from all classes of society, are randomly selected, and provide twelve differing viewpoints. *See* J. FRANK, *supra* note 92, at 126. Indicating that this purpose was a reason for the maintenance of jury trial in early England, see W. FORSYTH, *supra* note 88, at 355-58; T. PLUCKNETT, *supra* note 91, at 129-30. *See also* 2 F. POLLOCK & F. MAITLAND, *supra* note 64, at 619; De Parcq, *Thoughts on the Civil Jury*, 3 TULSA L.J. 1, 6 (1966).

159. *See* De Parcq, *supra* note 158, at 6; Summers, *Some Merits of Civil Jury Trials*, 39 TUL. L. REV. 3, 6 (1964); Wolf, *Trial by Jury: A Sociological Analysis,* 1966 WIS. L. REV. 820; *cf.* J. FRANK, *supra* note 92, at 126-37 (disputing proposition that jurors are better fact finders than a trial judge).

160. De Parcq, *supra* note 158, at 5-9; Summers, *supra* note 159, at 6. A number of psychological studies have shown that group decisions are fairer and more accurate in fact-finding than decisions of an individual. De Parcq, *supra* note 158, at 5.

Based on the results from several studies, including The Jury Project of the University of

A fair and impartial resolution of factual issues is important to all litigants, whether private or governmental.[161] To the same extent as private litigants, state litigants need the protection afforded by jury trial against a federal judge's possible biases or prejudices. Hence, the first purpose of the seventh amendment applies to state as well as private litigants.

The second and foremost purpose of jury trial, as it developed in England and the United States, was to protect the individual against arbitrary actions on the part of the Crown[162] or, in the United States, on the part of the federal government.[163] Two specific protections are encompassed within this purpose: protection against arbitrary laws formulated by the Crown[164] or by the federal government,[165] and protection against corruption of the judges by the Crown[166] or by the federal government.[167]

An analysis of this second purpose of jury trial in relation to a state's seventh amendment rights must be separated according to the two types of federal subject matter jurisdiction: federal question jurisdiction[168] and diversity jurisdiction.[169] The fact that state as well as federal law is adju-

Chicago Law School, Professor Kalven concludes that judges and juries agree on the same verdict in the majority of cases. Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1064 (1964). Judge and jury agreed in 80% of the criminal cases. *Id.* In personal injury cases, the judge and jury agreed in 79% of the cases. *Id.* at 1065. Professor Kalven also found that the level of disagreement between judge and jury regarding liability or guilt remained the same regardless of whether judges had classified the case as difficult or easy. *Id.* at 1066.

161. EEOC v. Corry Jamestown, 719 F.2d 1219, 1224 (3d Cir. 1983).

162. J. FRANK, *supra* note 92, at 109; H. STEPHENS, *supra* note 91, at 418-19; *see* Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 241 (1819); Wooster v. Plymouth, 62 N.H. 193, 195 (1882); E. COKE, *supra* note at 91, at 41; L. MOORE, *supra* note 92, at 50; *infra* notes 174-75.

163. J. FRANK, *supra* note 92, at 109; Wolfram, *supra* note 1, at 705-08; *see* Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 241 (1819); *infra* notes 176-79 & accompanying text.

164. J. FRANK, *supra* note 92, at 128; *see infra* notes 174-75 & accompanying text.

165. J. FRANK, *supra* note 92, at 109, 127; Wolfram, *supra* note 1, at 644, 705-08. The framers insisted upon the constitutional guarantee of civil jury trial to guard against unwanted legislation passed by a misguided national legislature. *Id.*; *see infra* notes 176-79 & accompanying text.

166. The judges of the king's courts were "very truly the king's servants. . . ." 1 F. POLLOCK & F. MAITLAND, *supra* note 64, at 204. He appointed and could dismiss them at a moment's notice. *Id.* "In the seventeenth century contests with the Stuart kings, [the jury] came to be highly regarded, popularly, as a check on royal judges doing the Crown's bidding." J. FRANK, *supra* note 92, at 109.

167. J. FRANK, *supra* note 92, at 109; Wolfram, *supra* note 1, at 708-10. The framers feared that a federal judge sitting without a jury would be likely "to protect the officers of government against the weak and helpless citizens." Wolfram, *supra* note 1, at 708 (citation omitted). Thus, "juries in civil cases were intended to guard private litigants against the oppression of judges." *Id.* at 709; *see* THE FEDERALIST NO. 83, at 563-64 (A. Hamilton) (J. Cooke ed. 1961).

168. *See supra* notes 1, 77.

169. *See supra* notes 1, 76.

dicated in federal court affects the analysis of the policy considerations underlying jury trial.

Federal Question Actions

The second purpose of jury trial is to protect against arbitrary federal legislation and undue influence over the federal judges.[170] In federal question cases, federal judges adjudicate federal law.[171] The laws are enacted by Congress; the states have no direct control over their formulation or enactment. Similarly, federal judges are appointed by the executive branch of the federal government and Congress confirms such appointments;[172] state governments do not participate in the appointment of federal judges. Consequently, in federal question actions in federal court, the state litigant is unlikely to exert influence, improper or otherwise, over either the federal legislature or the federal judiciary.

Because the state is unlikely to exert improper influence over the federal laws and judges, the state government does not pose the same potential threat of abuse of the federal system as does the federal government. Thus, in federal question actions, granting the state the right to jury trial would be consistent with the purposes of trial by jury: the jury would ensure a fair and impartial resolution of the facts and would remain a barrier against potential federal government abuses. Accordingly, the seventh amendment guarantee should be extended to states in actions in federal court based upon federal questions.

Diversity Actions

In actions in federal court based upon diversity jurisdiction, federal judges adjudicate state law.[173] Although states are unable to exert influence over the appointment of federal judges, in diversity actions states have the power to influence the law adjudicated. As a result, the argument could be made that granting the state the right to jury trial in diversity actions is inconsistent with the second purpose of jury trial.

Yet, even in diversity actions the overall balance of policy considerations underlying the seventh amendment weighs in favor of granting the states a right to jury trial. The fact that state law, rather than federal law, governs the dispute in diversity actions affects only part of one of the two main purposes of jury trial. The interests in the impartial resolution of the facts and in the protection against undue governmental influence over federal judges are still served by granting state litigants a right to jury trials in diversity actions. Indeed, the only policy consideration arguably inconsistent with extending seventh amendment protection to

170. *See supra* notes 162-67 & accompanying text.
171. *See supra* notes 1, 77.
172. U.S. CONST. art. II, § 2, cl. 2.
173. *See supra* notes 1, 76.

states is the interest in protecting a litigant from arbitrary legislation. The result could be that, in a diversity action adjudicating state law, the state could exercise a right established as a protection against potential abuses by its own governmental power. This concern that granting the state a right established to protect against arbitrary legislation may be inconsistent with the spirit of the seventh amendment, however, is less compelling in light of the following facts.

First, in England and the United States, the jury trial was established as a protection against abuses by a national governmental entity, not by a regional governmental entity such as a state. Several English commentators have stated that in England, jury trial is regarded as a right of the English populace against arbitrary action by the Crown.[174] The Magna Carta and the English Bill of Rights were grants of liberties from the Crowns of England to their subjects.[175]

In the United States, the framers of the Constitution preserved the right to jury trial in order to protect against arbitrary action by the national legislature.[176] On several occasions, the Supreme Court also has indicated that the seventh amendment right to civil jury trial is intended to secure the individual from the arbitrary exercise of the power of the federal government.[177] Additionally, the district court in *United States v. Griffin*,[178] confronting the issue of whether the United States was entitled to a jury trial in a federal condemnation suit, reasoned that "[t]he first ten amendments were intended to protect the people from governmental aggressions" and that it was "a mere perversion of the purpose and intent of the Seventh Amendment to contend that it gives the [federal] government a right to a jury trial in any case."[179]

Thus, American case law, as well as English and American commentaries, suggests that jury trial is aimed at protecting the individual against arbitrary action in federal court by the federal government, not

174. *See* 4 W. BLACKSTONE, *supra* note 91, at 349-50; W. FORSYTH, *supra* note 88, at 426.

175. Wooster v. Plymouth, 62 N.H. 193, 195-200 (1882); 1 B. SCHWARTZ, *supra* note 92, at 4-8, 40-46.

176. J. FRANK, *supra* note 92, at 139; Wolfram, *supra* note 1, at 705-08; *see supra* note 110.

177. *See* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830); Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819).

178. 14 F.2d 326 (W.D. Va. 1926).

179. *Id.* at 326-27. The federal statute for condemnation proceedings provided that a federal court was to conform its procedure to that of the state in which the district court lies. *Id.* at 326 (citing 25 Stat. 357 (1888) (repealed 1944)). The applicable state statute prohibited jury trial and provided for the appointment of condemnation commissioners. *Griffin*, 14 F.2d at 326 (citing VA. CODE ch. 176 (1919) (repealed 1970)). The court, therefore, held that the United States had waived its right to jury trial in federal condemnation suits. *Griffin*, 14 F.2d at 327. The court's reference to the seventh amendment pertained only to the federal government and is dicta. The holding in *Griffin* should be limited to its facts because it was decided on statutory grounds.

the state government. Thus, granting the state the right to a jury trial in diversity cases would not contravene the stated purpose of jury trial to protect against federal governmental abuse.

Second, the arguments for recognizing the state's right to jury trial in diversity actions is strengthened by the fact that the outcome of any suit by or against the state necessarily will affect the citizens of that state. In particular, a state may bring a suit in its proprietary capacity, just as an injured individual or corporation would,[180] or as parens patriae.[181] The parens patriae doctrine permits the state to bring suit on behalf of all its citizens, as a guardian of the well-being of its general populace.[182] In analogous situations, the Supreme Court has held that the right to jury trial on legal issues is unaffected by the fact that suit is brought by someone acting in a representative capacity.[183] Denying the state the right to jury trial when citizens suing individually would have such a right is anomalous. Furthermore, in certain cases, the claims asserted may not be significant enough for individual litigants to bring suit, but may be collectively important enough to the state from a public policy standpoint to do so in a representative capacity.[184] Affording the state a jury trial right recognizes the individual citizens' rights to a jury trial.[185]

Summary

In sum, consideration of the policies underlying the seventh amend-

180. *See* Pfizer, Inc. v. Government of India, 434 U.S. 308, 318-19 (1978) (foreign nation held to be a "person" within the meaning of the Clayton Act, 15 U.S.C. §§ 12-27 (1982), and thus entitled to sue under the federal antitrust statutes); Georgia v. Evans, 316 U.S. 159, 162 (1942) (domestic state held to be a person within the meaning of the federal antitrust statutes and thus entitled to bring suit pursuant to those statutes).

181. *See supra* note 46 & accompanying text.

182. *See supra* note 46 & accompanying text.

183. *See, e.g.,* Ross v. Bernhard, 396 U.S. 531, 538-39 (1970) (A corporation's right to jury trial in a shareholders' derivative action is not forfeited merely because its shareholders are pressing the claim for the corporation.); EEOC v. Corry Jamestown Corp., 719 F.2d 1219, 1225 (3d Cir. 1983) (When the EEOC brings suit on behalf of a victim of age discrimination, it is entitled to a jury trial.).

184. Nuisance, *see, e.g.,* Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), or antitrust claims, *see, e.g.,* Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945), may not be significant enough for individuals to bring suit, but may be collectively important enough for the state to do so in a representative capacity.

185. Standard Oil v. Arizona, 738 F.2d 1021, 1031 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 815 (1985).

It could also be argued that extending the seventh amendment guarantee to states in diversity actions would promote uniformity and the federal policy favoring jury trial. 9 C. WRIGHT & A. MILLER, *supra* note 92, § 2302; *see* Byrd v. Blue Ridge Coop., 356 U.S. 525, 538 (1958). The state would then have the right to demand a jury trial in all actions in federal court regardless of the basis of subject matter jurisdiction. Uniformity would not compromise the protections afforded by jury trial because even though state law may be in dispute, jury trial would still be needed to ensure an impartial resolution of the factual issues and to protect against undue influence by the federal government over federal judges.

ment indicates that a state should have the right to demand a jury trial in all actions in federal court, whether the action is based upon federal question or diversity jurisdiction. The state as a litigant does not pose the same threats of abuse of governmental power in federal court as does the federal government. The state cannot directly influence federal judges or federal law. While the state does influence the law adjudicated in diversity actions, the policies favoring an impartial resolution of the facts and protection against federal judges' biases make extending the seventh amendment protection to states consistent with the purposes of that amendment. Consequently, the "individual" that jury trial was intended to secure "from the arbitrary exercise of the powers of government"[186] should include the state government.

Conclusion

Reliance on English common law should not exceed its usefulness. The historic issue test has proven to be inadequate for determining a state's jury trial rights under the seventh amendment. The Ninth Circuit's application of the historic issue test in *Standard Oil v. Arizona*[187] relies upon an unprecedented use of party analogues and an incorrect analogy between the Crown of England and state governments in the United States to support its conclusion that the seventh amendment guarantee extends to states. Consequently, the decision is unconvincing and serves as weak precedent.

While the Ninth Circuit's application of the historic issue test inadequately resolves the issue of states' jury trial rights, the Tenth Circuit's traditional application of that test in *United States v. New Mexico*[188] fails to confront the issue. The Tenth Circuit failed to consider the significance of the fact that a state government made the jury trial demand. This omission is particularly anomalous in light of the fact that the Tenth Circuit examined the nature of the federal government's jury trial rights.

Applying a broad interpretation of the second stage of the traditional historic issue test, as in the Foreign Sovereign Immunities Act cases,[189] to the issue of a state's jury trial rights would lead to a result contrary to common sense and established law.

By considering the policies underlying the seventh amendment, the issue of whether that amendment extends to states as litigants can be squarely confronted and adequately resolved. As demonstrated above, granting the state the right to jury trial in federal court, regardless of the

186. Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819).

187. 738 F.2d 1021, 1031 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 815 (1985); *see supra* notes 55-65 & accompanying text.

188. 642 F.2d 397 (10th Cir. 1981); *see supra* notes 111-22 & accompanying text.

189. *See supra* notes 127-39 & accompanying text.

basis for subject matter jurisdiction, is consistent with and furthers the purposes of jury trial.

The right to jury trial symbolizes, among other things, notions of a fair trial. States as litigants in federal court are entitled to a fair and impartial resolution of the facts and to protection against potential arbitrary action by the federal government or federal judiciary. Basing a state's seventh amendment right to demand a jury trial on the policies underlying that amendment secures the state the right to jury trial and is faithful to the spirit of the seventh amendment.

*Julia A. Dahlberg**

* Member, Third Year Class.